No. 93-1085

FILED
FEB 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

R. V. TURNER, Individually in his former capacity as Superintendent of Glades Correctional Institution, CHESTER LAMBDIN, in his official capacity as Superintendent of Glades Correctional Institution,

Petitioners,

v.

ANTHONY LaMARCA, MARTIN SAUNDERS and EDWIN JOHNSON, individually and on behalf of all others similarly situated, and DAVID ALDRED, STEVE H. BRONSON, JR., EDDIE COBB, RON DURRANCE, and BILLY JOE HARPER, individually,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

DOUGLAS L. WILSON
FLORIDA RURAL LEGAL SERVICES, INC.
106 S. Second Street
Immokalee, Florida 33934
(813) 657-3681
(Counsel of Record)

DAVID M. LIPMAN
DAVID M. LIPMAN, P.A.
5901 S.W. 74th St., Suite 304
Miami, Florida 33143
(305) 662-2600

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a trial court may grant injunctive relief in a suit claiming that prison conditions violate the Eighth Amendment proscription against cruel and unusual punishment, having found that the prison administrators were guilty of deliberate indifference.

2. Whether a trial court may grant injunctive relief in respect to prison conditions which do not exceed the limitations of *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

3. Whether, in a case involving multiple plaintiffs, as to some of whom the defendants are entitled to a jury trial and as to the rest of whom the defendants are not so entitled, the Seventh Amendment requires a jury trial of the claims of the plaintiffs which involve the same facts, both as to "jury" and "non-jury" plaintiffs.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING AS TO INJUNCTIVE RELIEF AND DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS 3

A. THE COURT OF APPEALS DID NOT ERR IN APPLYING *WILSON V. SEITER* TO THE INJUNCTIVE RELIEF IT ORDERED REGARDING THE ELEMENT OF WANTONNESS 4

B. THERE IS NO CONFLICT WITH *BELL V. WOLFISH* AND NO DEMONSTRABLE CONFLICT AMONG THE CIRCUITS AS TO THE NATURE OF THE INJUNCTIVE RELIEF ORDERED BY THE COURT OF APPEALS 6

II. THERE IS NO CONFLICT WITH *LYTLE V. HOUSEHOLD MANUFACTURING* BECAUSE DETERMINATION OF THE CLAIMS OF THE "OLD PLAINTIFFS" WOULD NOT DETERMINE THE CLAIMS OF THE "NEW PLAINTIFFS" ... 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 6, 7

Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981) 5

Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) 4

Lytle v. Household Manufacturing, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990) 7

United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968) 5

Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) 4

Wilson v. Seiter, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) 3, 4

STATEMENT OF THE CASE

Respondents accept the Statement of the Case of petitioners, except that, as ɔ the last sentence (Pet. for Cert. 10), respondents disagree that the injunctive provisions ordered by the Court of Appeals intruded into the sphere of administrative minutiae.

Further, respondents adopt the facts presented in the District Court's opinion, *LaMarca v. Turner*, 662 F.Supp. 647, 655-662 (S.D. Fla. 1987), the Magistrate's Report and Recommendation, *LaMarca v. Turner*, 662 F.Supp. 647, 671-705 (S.D. Fla. 1987), and the District Court's Findings of Fact and Conclusions of Law (6-299). Specifically, respondents note the following findings, as modified by the District Court:

No. 38 (667 F.Supp. at 673): Former Superintendent Turner admitted in writing in 1981 that the security staff was "simply being tolerated by the inmate population."

No. 39: Turner had written the Secretary of DOC in 1979, "I am apprehensive about our ability to control this population under the circumstances."

No. 40: The Palm Beach County Grand Jury issued a presentment on January 30, 1980, which, inter alia, noted a breakdown of proper prison management resulting in thefts by inmates, lax security precautions, and a free flow of contraband, including drugs, alcohol, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI.

No. 42 (*Id.* at 674): Later in 1980, the Department of Corrections Office of Inspector General corroborated similar security issues involving supervision and vacancies.

No. 45: Some three years later, the DOC Inspector General still noted "a need for a great deal of improvement" as to laxity and even disregard of established procedures.

No. 64, *Id.* at 678: There was no procedure for reporting rapes.

No. 68: After inmate LaMarca testified in the LaMarca case about other abuse or violations of inmates, counsel for the superintendent gave assurances that this testimony would be investigated, but they were not (No. 69), and the superintendent was unaware of them, thereby (No. 70) underscoring that GCI was not under the control of the then-superintendent.

No. 71. The superintendent was on notice that rapes were occurring, and the failure to promulgate and adhere to the most rudimentary procedures constituted deliberate indifference toward inmate security.

No. 75, *Id.* at 679: Conditions in protective confinement were punitive, in that they lacked proper ventilation.

No. 77: "Wolfing" and catcalls of aggressive black inmates in the compound exerted severe sexual pressure.

No. 105(iv), *Id.* at 685: Among the things the former superintendent could have done to prevent rape of inmates was not only a standard investigative procedure, but one which included polygraph tests, psychiatric evaluations, and in-depth interviews.

No. 111, *Id.* at 686: Underreporting of rape, by as much as 50% in the non-institutional context, is generally accepted, and (No. 112) is even greater in prison, because

of the humiliating and degrading consequences, and also because reporting may dramatically increase the risk of being raped again.

No. 119, *Id.* at 687: The consistent racial pattern in rapes at GCI was black inmates assaulting whites, which (No. 120) might be due to socioracial considerations involving revenge against whites generally, or instead to a criminal, male, youthful black subculture of violence. Whatever the motive, a prisoner, especially a white and/or slightly built one, might be raped even on his first day at GCI.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' HOLDING AS TO INJUNCTIVE RELIEF AND DECISIONS OF THIS COURT OR OTHER COURTS OF APPEALS

Petitioners argue, in general terms, that the Court of Appeals did not apply the subjective test of *Wilson v. Seiter*, ___ U.S. ___, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991), and therefore its opinion is in conflict with that case. But the opinion of the Court of Appeals shows clearly that it accepts, follows and applies the principles of *Wilson*. In the absence of a clear showing of such a conflict, certiorari should not be granted.

A.

THE COURT OF APPEALS DID NOT ERR IN APPLYING *WILSON V. SEITER* TO THE INJUNCTIVE RELIEF IT ORDERED REGARDING THE ELEMENT OF WANTONNESS

Petitioners urge that, since the Court of Appeals found that the District Court had "failed to establish that the defendant had exhibited wantonness in accord with the standard prescribed in *Wilson v. Seiter* . . . ", there was an insufficient basis for ordering injunctive relief. This is a misleading characterization of the opinion of the Court of Appeals. In fact, the court held that all three of the required elements of *Wilson* were present (A.16, 23, 26), and remanded, on the issue of subjective knowledge, simply to determine whether that knowledge coincided in time with the occurrence of each violation complained of (A.29).

Such a requirement might be justifiable to support an award of damages resulting from those specific past injuries, but the inquiry for injunctive relief, being prospective, is different. Indeed, the parties are different: as to damages, the defendant in this case is R.V. Turner, the superintendent at the time of the injuries, sued in his individual capacity; as to injunctive relief, the defendant is Chester Lambdin, the current superintendent, sued in his official capacity. The Court of Appeals took care to point out this distinction (A.33-34), noting that as to official-capacity defendants, the defendant is really the institution (A.34, citing *Kentucky v. Graham*, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

Prospectively, a court's concern is whether sufficient measures have been taken to prevent harm from unconstitutional conditions in the institution recurring to *anyone* in the plaintiff class at *any* time. As the Court of Appeals pointed out, for injunctive purposes, the focus is not the deliberate indifference of the present incumbent superintendent, but the "historical indifference" of the institution (A.33), which requires the remedy of injunction unless it appears that "the wrongs of the past could not reasonably be expected to recur." *Jones v. Diamond*, 636 F.2d 1364, 1375 (5th Cir. 1981), cited by petitioners, citing *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344, 348 (1968). As the Court of Appeals noted (A.33), petitioners have not challenged the determination that the prison failed to provide inmates with safety. Petitioners, not the respondents, have the burden of showing that the wrongs will not recur, which they have not done. *Jones, supra.*

Petitioners failed to discuss the difference in identity of the parties, or the different focus of the Court of Appeals, and they failed to demonstrate that the injunction was unnecessary. There is no demonstrated conflict with this Court's decisions and certiorari should not be granted.

B.

THERE IS NO CONFLICT WITH *BELL V. WOLFISH* AND NO DEMONSTRABLE CONFLICT AMONG THE CIRCUITS AS TO THE NATURE OF THE INJUNCTIVE RELIEF ORDERED BY THE COURT OF APPEALS

Petitioners argue that the petition should be granted because there are conflicts among the circuits as to how *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), should be applied.

But the asserted conflicts are not as to any rule of law, rather petitioners suggest they consist of the specific remedies held proper by the various Courts of Appeals in response to a variety of factual patterns. Trying to establish that this complex matrix of factual considerations amounts to some conflict in legal policy among the circuits, both as to the causes of action and the relief ordered, would involve this Court in a factual quagmire.

At one point petitioners note that "other courts have deferred to parties to propose remedies." Pet. for Cert. 19. The cases cited have to do either with consent decrees or an order to submit a plan to comply with the court's order that conditions it found be eliminated. These cases tell us nothing about when or whether a court goes too far in ordering specific relief.

In view of the fact that none of the cases petitioners have cited as being out of step with *Bell v. Wolfish* expressly articulated any holding contrary to it, it was petitioners' burden to show that at least some manner of an implicit legal conflict with *Wolfish* existed in one or more circuits, that the identical conflict was present in the case at bar, and that the identical factual basis for those

conflicts was also present as to still other circuits which were in harmony with *Wolfish*. Petitioners have not made such a showing.

Indeed, petitioners do not demonstrate an indispensable link in that chain, namely that there was a conflict between the present case and *Wolfish*. The opinion of the Court of Appeals makes it clear that it was well aware of the *Wolfish* holding regarding over-interference in prison matters because it quoted an overlapping portion of the very passage from *Wolfish* which petitioners quoted (*compare* Pet. for Cert. 18 *with* A.36). It then went on to reduce the scope of the relief ordered by the District Court in light of *Wolfish*, expressly in deference to prison officials (A.37). There is thus no conflict between the case at bar and *Wolfish*, and therefore any asserted conflict with other circuits is completely irrelevant. Because the present case is harmonious with *Bell v. Wolfish*, certiorari is inappropriate.

II. THERE IS NO CONFLICT WITH *LYTLE V. HOUSEHOLD MANUFACTURING* BECAUSE DETERMINATION OF THE CLAIMS OF THE "OLD PLAINTIFFS" WOULD NOT DETERMINE THE CLAIMS OF THE "NEW PLAINTIFFS"

Petitioners urge that permitting the District Court to determine the claims of the original plaintiffs without a jury "will, through the effect of issue preclusion, effectively deny the right of the defendants to a jury trial of those common issues on the claims of the 'new plaintiffs.' " Pet. for Cert. 22. They assert that "[t]he present case parallels *Lytle [v. Household Manufacturing*, 494 U.S. 545,

110 S.Ct. 1331, 108 L.Ed.2d 504 (1990)] with near precision. . . . " *Id.* at 24.

Actually, the cases are day and night apart. In *Lytle*, one plaintiff had his §1981 claims dismissed erroneously, and this Court said he was entitled to jury trial as to those claims regardless of nonjury determinations by the District Court as to his Title VII claims on some of the same issues. In the present case, there are multiple plaintiffs with essentially the same claims, as to some of whom the defendants have been determined by the Court of Appeals to be entitled to a jury trial because of proper demand, and others, the original plaintiffs, as to whom the defendants are not so entitled. *Lytle* is completely inapposite.

The basic concern of petitioners, that something determined by the District Court on remand as to the original plaintiffs will affect determinations as to the later plaintiffs, is misguided. All that is involved is procedural management. Nothing prevents the District Court from trying all jury issues to a jury, and all court issues to the court. Issue preclusion is not involved at all.

Because there is no conflict with a decision of this Court, certiorari is inappropriate.

CONCLUSION

Petitioners have failed to demonstrate that a grant of certiorari is appropriate, and therefore it should be denied.

Respectfully submitted,

DOUGLAS L. WILSON
FLORIDA RURAL LEGAL SERVICES, INC.
106 S. Second Street
Immokalee, Florida 33934
(813) 657-3681
(Counsel of Record)

DAVID M. LIPMAN
DAVID M. LIPMAN, P.A.
5901 S.W. 74th St., Suite 304
Miami, Florida 33143
(305) 662-2600

Attorneys for Respondents